IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 142

ENDICOTT JOHNSON CORPORATION, a corporation, and HOWARD A. SWARTWOOD, Secretary, Endicott Johnson Corporation,

Petitioners,

against

FRANCES PERKINS, Secretary of Labor of the United States,

Respondent.

REPLY BRIEF FOR PETITIONERS

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Of Counsel.

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I.

THE POWER OF THE DISTRICT COURT.

Respondent says (Res. Br., pp. 17-18) that the defenses (i) of incrimination, (ii) that the subpoena is too vague and unreasonable, (iii) that the hearing is not of the kind authorized by the statute, (iv) that the subpoena is issued by one not having the authority, and (v) that the material called for does not relate to a lawful subject of inquiry, can be made and that therefore the Court does not perform a ministerial function and the constitutional prohibitions of Article III and the Fourth Amendment do not apply.

Point (i) rests upon a wholly unrelated constitutional prohibition, the prohibition against a witness being compelled to testify against himself (which does not apply to

corporations, and is not applicable to the issuance of subpoenas). Points (ii) and (iv) relate to cases where the defense sometimes, but not always, appears upon the face of the subpoena. Points (iii) and (v) require for their determination consideration of the hearing, of the statute and of the subpoenaed material. The respondent, however, urges that the District Court must determine whether the evidence sought by the subpoena is germane to a lawful subject of inquiry "on the pleadings". Thus, the very question at issue in the case at bar is whether the District Court is limited to "the pleadings" in its determination of whether the evidence sought is germane to a "lawful subject of inquiry". If the District Court may not look beyond the pleadings or beyond the face of the subpoena, when called upon to enforce an administrative subpoena, Article III and the Fourth Amendment to the Constitution are directly at issue.

The very authorities respondent cites require, in respondent's own language, that "to an application for the enforcement of a subpoena appropriate defense may be made"; but to this respondent adds, without authority, that this defense is limited to what appears "on the pleadings". Respondent does not even claim that there are such limitations in the authorities upon which she relies, and her qualification "on the pleadings" goes to the basis of the judicial process. It makes the action to be taken depend upon matters of form and not upon matters of substance.

This is brought out by respondent's own admission that if on these pleadings respondent had sought a list of petitioner's stockholders the request would have been properly denied; but, on respondent's own argument, respondent by

merely changing her pleadings could have gotten the list of stockholders, since respondent claims that the Court could not go back of the pleadings. Hence, whether the Court would have to order the production of the list of petitioner's stockholders would not depend upon the decision of any question of law or of fact but merely upon how the respondent worded her papers. When a court must act merely because of the allegations of a party, then neither of the requirements of Article III or the Fourth Amendment are met.

The Act has given the Secretary jurisdiction to inquire into violation of certain provisions of a contract calling for the manufacture of shoes at specified factories. The Secretary asserts jurisdiction to examine into the facts of employment in the manufacture of calfskin at another factory. Whether this latter assertion of jurisdiction is well founded can or cannot be determined by the Court, according to respondent, depending upon what the Secretary says in her application for the subpoena. If the Secretary had no jurisdiction to inquire into the calfskin factory, then that is certainly a defense that may appropriately be made within the decisions cited by respondent. But respondent urges that if the Secretary in her application uses the right words to assert her jurisdiction, then this appropriate defense may not be made. In other words, respondent claims that this Court was not establishing rules of substance but merely rules of pleading.

The argument of the respondent (Res. Br. pp. 20-21) that since an administrative proceeding cannot be enjoined by a defendant therein a subpoena must be enforced against it, irrespective of its defenses thereto, is dealt with in our main brief (pp. 34-35). However, it should be noted

that the respondent attempts to prove too much because the hearing could not be enjoined even for the defenses to the enforcement of a subpoena which it itself says might be maintained.

The argument based upon "the function of an auxiliary court" does not help respondent. The cases to which she refers are necessarily those in which one court was acting in aid of another court and the whole proceeding thus was judicial in its nature and the parties had the protection of the court and of judicial rules. Furthermore, respondent cited no case to the effect that in an action at law for breach of the provisions of a contract to manufacture shoes in specified factories the plaintiff could get a discovery in equity of conditions in a distinct calfskin factory without satisfying the court of the connection between the two. The equity court would exercise the judicial function in determining how far it would permit interrogatories, and while it might in the exercise of that function incline toward liberality there would be a point beyond which it would not go.* Furthermore, this is all basically different from an administrative officer, with limited powers, asserting that a court to which he applies for assistance in an alleged usurpation of power may not hear the claim of usurpation.

The analogy to Grand Jury investigations does not help respondent, as this Court has pointed out that the Grand

*The respondent admits (Res. Br. pp. 21 and 23) that the "auxiliary" court will determine "relevancy". The application for the subpoenas *duces tecum* in the case at bar alleges that the material subpoenaed is "relevant, material and necessary" (R. 7). This allegation is denied (R. 14) but under the contention of the respondent, and exactly in accord with the reasoning in her brief, the District Court would be required to accept without inquiry the allegation that the material is "relevant, material and necessary". Thus the respondent refutes her own argument.

Jury historically is *sui generis*. Even so, this Court has held, as pointed out by us in our main brief (p. 26), that the subpoena *duces tecum* issued in a Grand Jury proceeding is subject to the Fourth Amendment. *Hale* v. *Henkel*, 201 U. S. 43 (1906).

It is noteworthy that respondent in no place addresses any argument to the intent of Congress. As we have pointed out, Section 5 of the Walsh-Healy Act was passed by Congress following the pattern of various other statutes with a line of judicial interpretation going back to *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894). If Congress had intended that in the enforcement of this Act, the Secretary should have any other or greater powers of subpoena, or that the District Court should exercise a different type of jurisdiction than had been customary, surely there would have been some reflection of it in the statute. Without admitting that Congress could give the Secretary the subpoena power and could limit the jurisdiction of the District Court, as held by the Circuit Court of Appeals, we argued that such was not the proper construction of the statute. Respondent has limited her argument to what she believes Congress could do or what an administrative officer would like Congress to do, and not to what Congress has done.*

The decision of the Circuit Court of Appeals is unprecedented and the cases cited by the respondent (Res. Br. pp. 27-28) do not support it. *Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7th, 1940), cert.

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*The respondent urges that the action of the District Court operates "to forestall" (Res. Br. p. 27) the Secretary's judgment. It should be observed, however, that the District Court has acted at the Secretary's own invitation. She instituted the proceedings and asked the District Court to act.

den. 311 U. S. 690; *Cudahy Packing Co.* v. *Fleming,* 119 F. (2d) 209 (C. C. A. 5th, 1941), rev'd on other grounds, *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357; were cases where the subpoena was objected to because no specific violation of the statute was charged. *National Labor Relations Board* v. *Barrett Co.,* 120 F. (2d) 583 (C. C. A. 7th, 1941), involved the question of whether a subpoena might be issued on an investigation as distinct from whether a subpoena might be issued only after a complaint had been served. *President* v. *Skeen,* 118 F. (2d) 58 (C. C. A. 5th, 1941), held that an oil company was subject to the Connally Act, though it did not itself transport oil in interstate commerce, because it might sell or deliver oil that would be transported in interstate commerce. *Graham* v. *Federal Tender Board No. 1,* 118 F. (2d) 8 (C. C. A. 5th, 1941), involved only a question of procedure and has nothing whatsoever to do with the issues in the case at bar. *United States* v. *Clyde Steamship Co.,* 36 F. (2d) 691 (C. C. A. 2nd, 1929), cert. den. 281 U. S. 744, involved a question of rebates under the Interstate Commerce Act and does not pertain in any way to the issues in the case at bar. The District Court decisions, cited by the respondent, are equally irrelevant or do not support the respondent.

II.

COVERAGE.

The opinion of the Court below stated that the Court "inclined" to believe that the testimony taken by the District Court proved the fact of coverage. However, it specifically stated that "we have not gone into that matter"

(R. 303). Since the opinion of the Court states expressly that the Court had not gone into the question of coverage, the statement that it was "inclined" to believe that coverage existed cannot be given weight.

The respondent states that Section 1(e) "is not limited to employees of the contractor itself" (Res. Br. p. 31) but applies "where part of the manufacturing process is carried on by subcontractors". Section 1(e) differs from the remaining subsections of Section 1 of the Act in that it states "no part of such contract" will be performed or any of the materials, etc. be manufactured "or fabricated" in plants not meeting the sanitary or hazardous conditions prescribed by the section. The Regulations issued by the Secretary in 1937 (R. 179-180) recognize this difference and state that while subsections (a), (b), (c) and (d) of Section 1 do not apply to subcontractors, subsection (e) does so apply. This very ruling therefore confirms the construction of the Act for which we contend. The ruling by the Secretary was that the language of subsection 1(e) was sufficiently broad to include subcontractors who furnished supplies and materials to the contractor but subsections 1(b) and 1(c) were not sufficiently broad to include subcontractors. Since the distinction in the language of the Act is not that of a contractor or subcontractor, but is based upon the work done, clearly tanning leather, manufacturing rubber heels and soles, manufacturing of counters and cartons might come within Section 1(e) but not within Sections 1(b) and 1(c).

The rulings and regulations concerning "integrated" industries referred to by respondent (Res. Br. pp. 33-35) were all *after* the contracts involved in the case at bar were completed. The respondent is mistaken in stating that its rulings at the time the contracts in question were being

performed (*i.e.*, its rulings in *International Harvester Company* and *Baldwin Locomotive Works*) related to stocks on hand at the time contracts with the Government were performed. Those rulings were not so limited and indeed, by implication, made clear that they related to stocks produced subsequent to the time at which the Government contracts were entered into.

We of course do not contend as respondent seems to believe (Res. Br. p. 38), that the definitions of industries by the Census Bureau, the Wage and Hour Division of the Fair Labor Standards Act and the National Industrial Recovery Act are binding under this Act. We submit, however, that they are clearly pertinent guides in the construction of the Act.

III.

CONCLUSION.

The order of the Circuit Court of Appeals for the Second Circuit should be reversed and the order of the District Court for the Northern District of New York should be affirmed.

Respectfully submitted,

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